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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1167~~ 70.

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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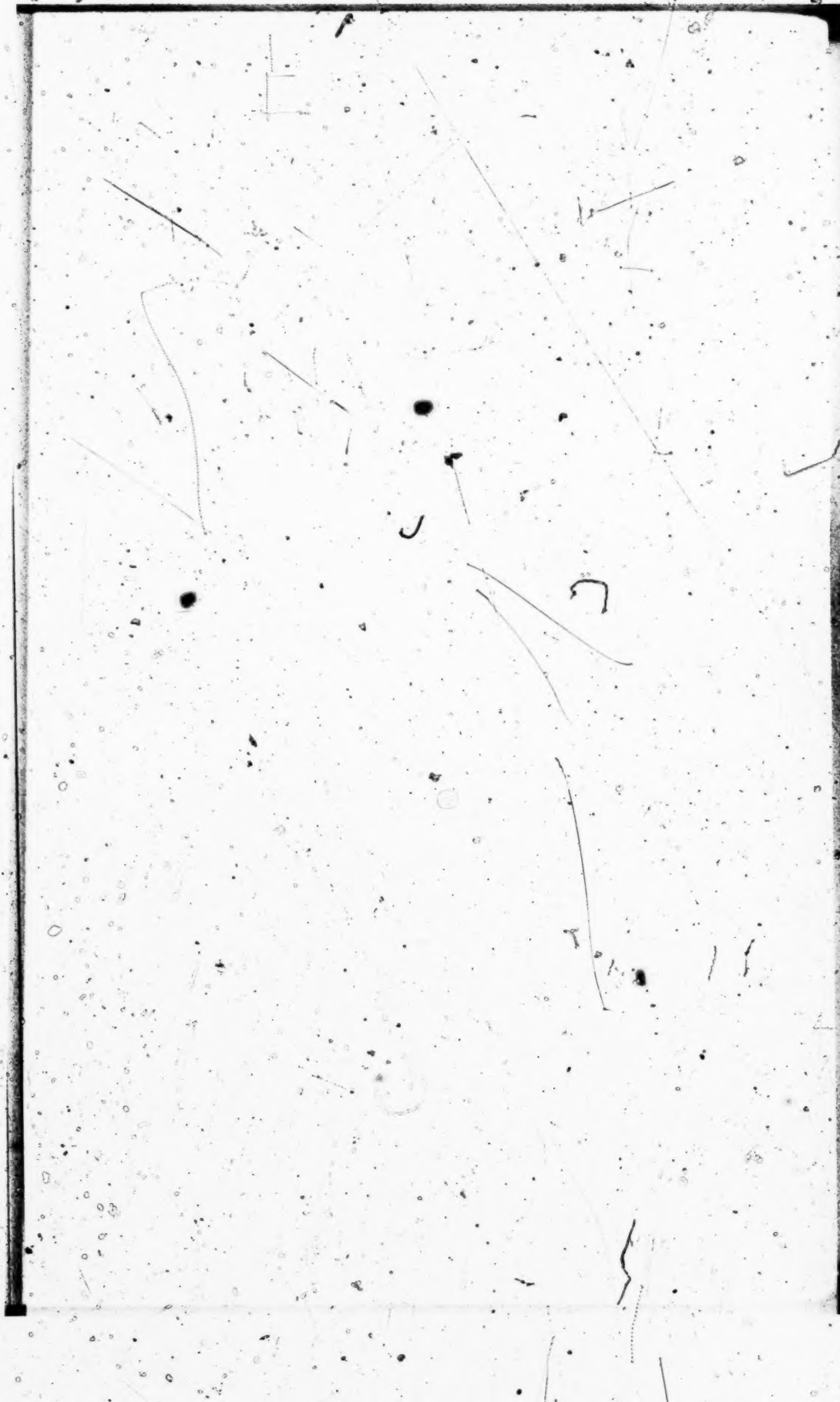

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI*

Question Presented

Whether Petitioner, which claims that no notice whatsoever of limitation of liability under the Warsaw Convention need be contained in the passenger ticket, has presented sufficient reasons for issuance of a writ of certiorari, particularly when the narrow issue involved has become virtually moot?

Statement of the Case

These are actions for wrongful deaths and serious personal injuries variously suffered by respondents and their decedents (collectively referred to herein as "plaintiffs") arising out of an airplane crash on February 26, 1960 on

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*Emphasis wherever the same appears is our own. References to the Appendix to the Petition are noted as "App. B."

take-off from Shannon Airport, Ireland, in the course of a transatlantic flight from Rome to New York on an aircraft owned and operated by petitioner (hereinafter referred to as "Alitalia"). In its answers to the complaints herein, Alitalia uniformly set up affirmative defenses to the effect that the transportation herein was subject to the Warsaw Convention (hereinafter sometimes referred to as "Warsaw") and to the limitation of liability thereunder in the maximum sum of $8,300.

Plaintiffs moved in the District Court for partial summary judgment striking the defenses on the ground that there was no delivery of a ticket to the passengers containing readable and intelligible notice of limitation of liability as required by Warsaw and under American law and that therefore the small damage limit of liability could not be applied. Alitalia claimed that the ticket need contain no notice, nor any other particulars and, in effect, could be blank.

The Decision of the District Court

The decision of the District Court (App.B, p. 43, 253 F. Supp. 237) in granting the motion and striking the defenses of limitation of liability, reproduced the so-called ticket, baggage check and coupon which eloquently illustrated the accurate and descriptive language of its opinion (App.B, pp. 49, 50). Judge MacMahon held that pursuant to the provisions of Warsaw, prior to departure, a ticket and baggage check must be delivered which notifies the passenger that the provisions of Warsaw which exclude or limit liability are applicable; that the statements in the so-called ticket were printed in such a manner as to be virtually unnoticeable and unreadable and that as a matter of law no delivery of a ticket, as required by Warsaw, was made; and further that the conditions were camouflaged in:

". . . Lilliputian typography, . . . which must be read through 'a magnifying glass' . . . (and) is at war with the intent of the Convention" (App.B, p. 51).

". . . Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering in to a special contract with the carrier (article 22(1)), or taking out additional insurance" (App.B, p. 46).

The District Court interpreted Warsaw within its framework and cited and applied established principles of law.

The Decision of the Court of Appeals

The Court of Appeals below affirmed the District Court, two-to-one (App.B, p. 13). The majority fully agreed with the District Court that Alitalia had failed to deliver to the passenger a readable and intelligible ticket complying with the Warsaw Convention. It did not hold, as inaccurately stated by Alitalia (Petition p. 6), that "prior actual notice" of limitation of liability must be given to the passenger; nor did the court rule further than the application of Article 3 of the Convention.

The court incidentally noted the Convention's arbitrary limitations on liability, "which have been severely and repeatedly criticized" are advantageous to the carrier but that "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is

given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (App.B, p. 20). The court noted that in this connection Article 3 should be read together with Article 22(1); and that its decision was generally consistent with the position of the United States and the C.A.B.

The court below agreed that the District Judge "appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print'." The court also observed in a footnote no. 10 that even if a passenger were able to read the fine print "it is highly questionable whether he would be able to understand the meaning of the language" (App.B, p. 22).

The Dissenting Opinion

In his dissenting opinion, Judge Moore perforce assumed a series of extreme postures. While agreeing that the ticket provisions were "in exceedingly small type", Judge Moore expressed the extreme view that adequacy of notice on the ticket was immaterial; that even if a "one-sided advantage is being taken of the passenger" he was not protected by Warsaw, and, in any event, apparently should not be protected by our courts. Judge Moore attempted to reinforce his argument by erecting a straw man of an "actual notice" ruling which, in fact, had not been urged by the plaintiffs or held by the courts below. It should be stated that, except for a slight increase made by the Hague Protocol (not accepted by the United States) no "substantial revisions upward . . . have been made by treaty", as claimed by Judge Moore. (These increases have been by private agreement of the air carriers in order to induce the United States to withdraw its denunciation of Warsaw (see footnote 7, majority opinion, App.B., p. 20).

Nor did the courts below attempt to revise the limits as suggested by Judge Moore. They were concerned only with and ruled only upon the adequacy of notice of the limitations of liability as expressed on the ticket. In no way did they rewrite the convention but merely construed sections pertinent to the point at issue.

Judge Moore took the extreme and unsupported position that the convention so clearly stated that no notice need be contained in the ticket (and that any kind of ticket could be delivered to the passenger), that there was no room for construction; that construction meant interference and "judicial treaty-making." Judge Moore chose to ignore the well-established rule that a treaty, like any other federal statute, is subject to judicial construction and application. It should be observed that Alitalia has plucked out of its doubtful context a few selected phrases from the dissent and made them the central structure of its application.

Rehearing Was Denied *In Banc*

Alitalia's application for a rehearing was denied (App.B, p. 36). Alitalia also made an application for rehearing to the entire court *in banc*. This was also denied by a two-thirds majority of six to three (App.B, pp. 39, 40). There can be no question that the issues herein have been thoroughly reviewed.

The So-Called "Questions Presented" by the Petition, Numbered 1, 3 and 4, Are Not Here Involved, Are Improper and Should Be Disregarded

Alitalia has improperly injected non-existent facts and issues which were not present below and are not before this court. To the extent also that Alitalia has attempted

to further intertwine these into and color its petition, they should be there disregarded.

A. *As to so-called "Question" No. 1:* At no time did the plaintiffs in their motion papers for partial summary judgment or in their arguments or briefs to the District Court or to the Court of Appeals contend that "actual notice" of the limitation of the air carrier's liability to the passengers must be given to the passenger before the limitation becomes binding. Nor did the courts below treat this as a contention or issue nor so hold. Plaintiffs' claim was that the airline must deliver to the passenger a ticket containing clear and readable notice to the passenger that his transportation is subject to the liability limitations of the Warsaw Convention (R.16a, App.B, p. 44). Accordingly, Question No. 1 of the petition is contrived and non-existent and should be disregarded.

B. *As to so-called Question No. 3:* It should be noted that only the adequacy of the ticket as such was put into issue in the District Court by the plaintiffs' moving papers (R.13a, 15a, 17a, 26a, 29a) as further certified by plaintiffs' attorney (R.31a, 33a), and also as certified by Alitalia's attorney (R.34a). The plaintiffs did not put into issue the adequacy of the baggage check (the values there involved are minimal) and any attempt by Alitalia on this application to raise the issue of the adequacy of the baggage checks is improper and is a transparent attempt to support a claim that there is a conflict among the Courts of Appeal on a point not at issue here. There is a vast difference in the basic approach of the courts to the question of limitation of liability for wrongful death or personal injuries and in their approach to the limitations of liability for loss of baggage or personal property. Accordingly, Question No. 3 of the petition is contrived and non-existent and

should be disregarded, and any reference below to the baggage checks be treated as dicta.

C. *As to so-called Question No. 4:* The "readability" of the conditions of the passenger ticket was conceded by both sides to be a question of law. At no time in its papers, briefs or argument to the courts below did Alitalia claim that this was a jury question. It treated the same as a question of law. See also the majority opinion in which this fact was specifically noted at footnote 9 and in which it was stated: "The parties have agreed that this is a question of law for the court to decide" (App.B, p. 22). In fact, Alitalia's position in its brief to the Court of Appeals below was that as a matter of law, the ticket need not contain any information; and that it could deliver any kind of ticket virtually amounting to a blank "Boarding Pass", upon which event the limitations of the Convention would automatically apply in a Warsaw situation. Point I of Alitalia's brief to the Court of Appeals read:

> "The Sanction in Article 3(2) Applies Only Where No Passenger Ticket is Delivered and Does Not Apply Where Any of the Prescribed Particulars are Omitted from the Passenger Ticket."

Accordingly, Question No. 4 of the petition is contrived, non-existent and should be disregarded.

REASONS FOR DENYING THE PETITION

Summary of Argument

The Court of Appeals followed a well established principle of construction of treaties and has given Article 3 a reasonable construction within its context and history that is incidentally fair to both the passenger and the air carrier. The decision is consistent with the overall pattern and intent of Warsaw to give the passenger clear and readable notice in the ticket of its exculpatory provisions. The decision observes basic legal principles and is in accord with reported authority. It is in accord with the policy of the United States Government and of the Civil Aeronautics Board's own regulations requiring clear and adequate notice. It does not become a "virtual denunciation" of the treaty merely because it holds that the terms and conditions of the ticket should be in readable form, in contrast to Alitalia's position that the ticket need contain no notice and can be practically blank.

In April 1963 the Civil Aeronautics Board again criticized the unreadability of the Warsaw tickets and directed that notice be given to passengers in prominent and clear type and language. (See Opinion below, footnote 10.)

There is no conflict with a decision of another court of appeals on the same matter, the only issue herein being the readability of the ticket as such. There was no denial of a jury trial, the parties having agreed this was an issue of law. Furthermore, the courts below held that a jury could not have reasonably found that the ticket gave the passenger the required notice.

In 1965, because of general dissatisfaction with the treaty, the United States Government gave notice of with-

drawal, effective in six months, which notice was withdrawn on the last day when the principal international air carriers agreed to raise the limits to $75,000 (Opinion below, footnote 7, App.B, p. 20). It is respectfully submitted that under the circumstances, in view of the corrective measures with respect to notice taken since this accident by the Civil Aeronautics Board (apart from the increases agreed to by the airlines), the issue herein has become virtually moot.

Neither the Court of Appeals nor the District Court departed herein from the accepted and usual course of judicial proceedings. No reasons exist for the issuance of the extraordinary writ of certiorari.

I.

The decision below is amply supported by authority. Prior readable and clear notice in the ticket of limitations of liability is required by the Warsaw Convention.

Alitalia has again taken the stance that no notice of any kind need be given to the passenger, and that it may decline any kind of ticket, which could be a virtually blank ticket or "boarding pass." Petitioner would have the court believe that this is all the Convention requires of the carrier, before it can escape liability for its negligence at little price.

The decision of the Court below follows the principles and reasoning in *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (C.A.2), *Warren* v. *Flying Tiger Line, Inc.*, (1965 C.A.9) 352 Fed.2d 494, and *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804 (C.A.2) and is in accord with the basic principles of American law requiring reasonable notice in a ticket where limited liability for injury to the passenger

is sought to be imposed, notwithstanding the negligence of the carrier.

The principle is well established that a party seeking to impose an unusual condition, such as a limitation of liability which is basically repugnant to our American system of jurisprudence, has the burden of showing that the transaction comes within the exception to our prevailing rule of law of unlimited liability for negligence. See *Santa Fe Ry.* v. *Grant Bros.*, 228 U.S. 177, 184 (1931); *Oceanic Steam Navigation Co.* v. *Corcoran*, 9 F. 2d 724 (C.A.2, 1925); *The Majestic*, 166 U.S. 375, 385; *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 244; *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34; *Hawson* v. *Pennsy. R.R. Co.*, 48 N.Y. 212. Compare insurance contracts, which are construed against the insurance company; *Lachs* v. *Fidelity & Casualty Co. of N.Y.*, 306 N.Y. 357; *Hartol Products Corp.* v. *Prudential Insurance Co.*, 290 N.Y. 44, 49.

In the course of its analysis of the convention, the court below stated:

> "Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*
>
> This is not the first occasion on which we have been called upon to interpret the language of the Convention's delimiting provisions. For example, in *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a 'delivery' within the meaning of Article 3(2). We stated:
>
> We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to*

afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability,' (Article 22 (1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.*" Id. at 856-57 [Emphasis added].

We held, accordingly, that the delivery was inadequate and the Convention's fixed limits of liability were not available."

The court below concluded that the notice on the ticket was illegible and unreadable:

"Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed."

II.

The requirement of adequate notice in the ticket is inherent in the overall pattern of Warsaw.

The structure of Warsaw, which is a private, rather than a public, international treaty, is skeletal. "The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law." (Sand: Air Carrier Limitation of Liability 28 J. Air L. 260, 267 n.67; article cited in Opinion below, note 7, App.B, p. 20). As the above shows, and the following discussion establishes, that with respect to uniformity, it suggests at best a uniformity of principle, leaving individual applications and situations to the signatory power's own law. Compare Articles 21, 24(2), 25(1), 28(2) and 29(2).

A. *"Scope-Definitions" and Other Related Articles of the Convention:*

An examination of the traffic document articles in relation to the Convention as a whole establishes that the ticket must contain certain essential information including notice of limitation of liability and cannot be a mere "Boarding Pass". Warsaw must be read as a whole.

In the "Scope-Definitions" of Article 1, it is provided that:

> "(2) . . . 'international transportation' shall mean any transportation in which, *according to the contract made by the parties,* the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, . . ."

"(3) Transportation . . . by several successive air carriers shall be deemed, . . . to be one undivided transportation, if it has been *regarded by the parties* as a single operation . . ."

Obviously, the reference to "contract" necessarily refers to the ticket since only from this document can it be determined what the territories are that are involved, the place of departure, and the place of destination in order to determine whether it is Warsaw transportation. The "contract" (or meaningful) ticket concept is repeated in "Transportation Documents", Articles 3, 4, 8 and in the venue provisions of Article 28, and in the successive carriers provisions of Article 30, all of which presuppose the existence of an intelligible ticket.

Consistent with this scheme, are the provisions of Article 22(1) where it is stated "Nevertheless by special contract, the carrier and the passenger may agree to a higher limit of liability." This provision would be meaningless if the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by the Court of Appeals below.

B. *The Difference in Drafting Between Article 3 and Articles 4 and 8 Is Consistent With a Notice Requirement:*

(1) As to Article 3 (Passengers)

Article 3 provides that, "the carrier must deliver a passenger ticket which *shall* contain the following particulars". The particulars for the most part are details of the contract requirements of Article 1. For example,

(a) "The place and date of issue"

(b) "The place of departure and of destination"

(c) "The agreed stopping places" (Under Article 1 it would be necessary to either (b) or (c) as a means of determining the international character of the transportation.)

(d) "The name and address of the carrier or carriers" (The application of Article 28 would require the ticket to contain items (a), (b) and (d) in order to determine where the action may be brought.)

(e) "A statement that the transportation is subject to the rules relating to liability established by this Convention".

(The Court is respectfully referred to Point I *supra.*) Our comment with respect to Article 22(1) and the overall structure of the convention underlines the importance of item (e) above. See the opinion below and *Mertens* and *Warren,* (*Supra,* p. 9).

Subdivision (2) of Article 3 provides as follows:

> "(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

This language eliminated the possibility of the carrier being penalized by some slight clerical error or other minor irregularity, or by the omission of an item non-essential to the particular transportation, or by the ticket being lost or not presented ("absence") at embarking. A greater flexibility was achieved in relating an omission on the ticket to its

materiality in a given situation. See discussion of its history at Point III hereof, *infra.*

It was thus left to the national courts when the situation arose, as it did in the *Mertens, Warren* and in the instant case, to state what constitutes delivery of an adequate ticket under the circumstances. (Sand: *op. cit. supra,* p. 12)

(2) As to Articles 4 and 8 (baggage and goods):

In the transportation of unaccompanied baggage or goods, on the other hand, certain specific particulars are necessarily explicitly stated to be minimal. In the case of baggage (Article 4), these particulars are a means of identifying the baggage by requiring the number of the passenger ticket to be written on the baggage check, and, in order to determine the dollar amount of liability by requiring the number and weight of the packages to be listed. The accompanying mandatory statement that the transportation is subject to the limitations of liability established by the Convention is particularly necessary when read with Article 22(2) which describes the method of computing the dollar amount of damages in the case of baggage or goods. Article 8 (the airway bill) is for or similar reasons detailed as to the nature of the goods, the international character of the transportation, and the weight and the quantity of the packages and notice of limitation in order to compute dollar amount of damages under 22(2).

III.

The history of Article 3 shows that it was designed for flexibility and the application of national law.

A.

Alitalia contends that Article 3 is so clear on its face as to require no further reading. Yet it refers to so-called legislative history to clarify it (Petition pp. 8, 10). It is submitted that this history, to the extent pertinent, supports respondent's position that greater flexibility was desired by the draftees in the application of Article 3.

Alitalia's stress on the drafting change made in the original Article 3 by the Greek proposal is misplaced. The Greek proposal did not intend to remove sanctions as against a ticket omitting essentials but merely was designed to protect the carrier against minor errors by its clerks in making out a ticket and in omitting what might later turn out to have been merely a non-essential item that did not effect the transportation nor "injure the passengers", as noted in the *Grey* case. This is demonstrated by Goedhuis' own report of the proposal of the Greek delegate at p. 152 of his book. We quote:

> "With regard to this article, the delegate of the Greek Government at the Warsaw Convention pointed out that the sanction provided in the case under (2) would be much too rigourous *if the carrier had omitted to put down the place of issue or the place of destination, or his name and address, just through carelessness.* How could this severe sanction against the carrier be justified *if the omission was of no interest to the other party and of no injury to him?*"

Article 3 was designed in such a manner as to allow for the operation of local national law to determine as here whether an omission on the ticket was material.

B.

The defendant has attempted to make capital out of the fact that the Hague Protocol amending the convention (not adhered to by the United States) makes a drafting change in Article 3, specifically eliminating the limitations of liability for failure to state essential items in the ticket.

A reading of the minutes will show that the change in the Hague Protocol as to notice in Article 3 was due to the realization that the technique of leaving the remedy to local law may have created differences of application and approach in various national courts. There was almost unanimous agreement of the Hague delegates that notice to the passenger should be made more explicit. It was thus decided to adopt the American suggestion to specifically provide for uniformity among all the document provisions so that the remedy would be universal. What was predicted by the American delegates (remarks of Mr. Calkins on page 116 of Minutes of 1955 Hague Conference, ICAO Document #7686-LC/140) and others as to the requirements of the American courts with respect to notice has come to pass in *Mertens, Warren* and *Lisi.* The decision below is consistent with the position of the United States and the CAB on the issue of adequate notice, (*infra* p. 18).

C.

It may be observed that the principle of "practical construction by the parties" should refer to the signatory powers rather than the airlines. It cannot be used to solidify a one-sided ticket imposed upon the unsuspecting passenger

by the airline. Here consider the repeated criticisms of the CAB.

The cases cited at p. 5 of the petition do not contravene this principle. In fact they support it. They all uniformly agree that "It is a general principle of construction with respect to treaties that they shall be liberally construed." *DeGeofrey* v. *Riggs*, 133 U.S. 258, 271.

IV.

The decision below is in accord with the position of the Civil Aeronautics Board and United States public policy.

A.

Alitalia claims at page 16 of its brief that the passenger tickets herein were approved as to form and content by the C.A.B. citing 24 CAB 575 (1957). In that proceeding, the C.A.B. limited itself to approving the interline resolutions and agreements, and it specifically criticized the ticket in its Order E-11024 appended to its decision, expressly observing also at p. 577 that it did not necessarily approve of the legal effect of the ticket.

The more recent policy of the C.A.B. is contained in its notice of proposed rule making, Economic Regulations, Docket 14411, dated April 1, 1963, (extensively commented upon by the court below in its opinion note 10, App.B, p. 22 *et seq.*)

As to the small print on the face of the ticket, the C.A.B. said:

> "It appears to the Board that *this notice may be inadequate in two major respects*: First, the ticket by no means the most effective instrument for advising a

passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the *notice is currently printed on the ticket is too small* to alert the passengers to the importance of the matter. *Second, the fact of greater significance to the passenger, namely, the amount of limitation on liability for death or injury does not appear in the notice.*"

In its Order No. E-1944, Docket 14411, adopted by the C.A.B. on April 1, 1963, referring to agreement C.A.B. No. 10559, R-2, relating to the form of passenger ticket and baggage check, the C.A.B. said:

"Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) *the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter,* and (2) that the monetary limit of liability for death or injury does not appear in the notice. Therefore, in conjunction with the proposed amendment of Part 221, the *Board will re-examine its approval of the IATA Agreement* relating to the form of tickets and baggage checks (Agreement No. CAB 10559 R-2)."

This order refers to previous Order E-11024, which had been adopted February 21, 1957, contained in 24 CAB 575, (*supra,* p. 18).

In the previous referred to Docket 14411, dated April 1, 1963, the C.A.B. also proposed to add a new paragraph (j)

to Title 14, C.F.R. §221:38 which now provides for a notice of limitation of liability for injury or death under the Warsaw Convention, specifically stating:

> "Notwithstanding the provisions of the paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liablity to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added."

It is clear from the foregoing that the C.A.B. had not approved this ticket as such, but had found the same faults with it as have our courts in *Mertens, Warren* and *Lisi.*

B.

The exaggerated posture of "treaty repudiation" taken by Alitalia and of alleged adverse foreign repercussions has no relation to reality. In the first place, to require a clear and readable notice of limitation of liability to be placed on a passenger's ticket is hardly radical or earth-shaking and is in healthy contrast to Alitalia's position that the ticket need contain no notice and be merely a "boarding pass."

Alitalia's attorneys (who also are attorneys for BOAC largely owned by the British Government) improperly refer to and incorporate a House of Commons debate as Ap-

pendix C, which is irrelevant and should be disregarded. They stress a question raised in the House of Commons as to the effect of the *Lisi* decision. With due respect, it is evident from the extensive minutes that there was little understanding of the narrow scope and effect of the *Lisi* decision. There is no explanation of the circumstances prompting the question. But the debate nevertheless revealed general dissatisfaction with the low limits of recovery; acknowledgment that the Warsaw limitation "has worked out to the advantage of the carriers throughout the world" (p. 60); that "there should be a prominent notice, not just a fine print statement"; that a notice should be "a reasonable person's notice" (p. 66).

On the other hand, Alitalia failed to refer to the prolonged discussions in our Senate, newspapers, magazines and other public media, showing disapproval of the Warsaw Convention as one-sided, inequitable and un-American and which in large part called for our withdrawal, to which our Government ultimately responded. (See opinion below, note 7).

V.

There is no conflict with another Appeals Court as to the issue here involved.

As initially stressed at page 9 hereof, the motion for summary judgment was concerned solely with the sufficiency of the passenger tickets and not with the baggage checks. Any comment by the court below that may have included the baggage checks was unnecessary to its decision and should be regarded as dicta. The *Seth* case, decided by the First Circuit, is concerned solely with the adequacy of the baggage check, which is not in issue here.

The *Seth* case involved baggage and goods and not passengers. Whatever its shortcomings, it is consistent with the general American rule recognizing the principle of limited liability or released value in the case of baggage or cargo. On the other hand, there is no such American rule applicable to death or injury to passengers. *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 44. The petition makes a transparent attempt to create a synthetic conflict of decisions on the same matter.

VI.

The parties agreed to treat the issue as a matter of law and there was no denial of a jury trial.

This has been sufficiently adverted to at page 7 hereof. Furthermore, the Court of Appeals (and District Judge MacMahon) held:

> "We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."

The *Atlantic* and *Gulf* case cited by Alitalia at p. 17 of the Petition merely held that the Court of Appeals should not have reversed a verdict by the jury which was the trier of the facts submitted to it.

VII.

The foreign authorities* and cases cited by Alitalia are not in point.

At page 14 of its brief, Alitalia refers to books written by Goedhuis, Shawcross and Beaumont and Drion. It is questionable whether they would qualify as disinterested legal scholars. Alitalia cannot deny that they have variously served principals (whose interests as to Warsaw were in limiting liability), such as International Airlines, or their European Government owners, or their insurers.

Dr. Goedhuis' book was published in 1937 when international air transportation was in its infancy and court decisions were sparse. As its title suggests, Goedhuis was primarily concerned with comparing the air legislation of various countries with the Warsaw Convention in an effort to expand the Convention's acceptance. As stated in his preface, his book was an outgrowth of his report to the International Air Traffic Association, the purpose of which was to push the adoption of the Warsaw Convention by all countries.

H. Drion, at one time, was an attorney associated with KLM Airlines. His book, published in 1954, could not have considered the *Mertens* and *Warren* decisions.

Shawcross and Beaumont's long association with British air carriers or their insurance carriers is well known. Unfortunately, the latest edition of this book does not contain any reference to or discussion of *Mertens, Warren* or *Eck,* the only other decisions which have any real relevance to the issues involved herein.

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* These observations which were made in plaintiff's brief to the Court of Appeals were not challenged by Alitalia.

The *Grey* case cited at pages 9 and 14 of Alitalia's petition was distinguished by the Court below in this and in the *Mertens* case. *Grey* was solely concerned with whether the omission in the passenger ticket of certain "agreed stopping places" as provided in Article 3(1)(c) was fatal to the carrier. This relatively minor omission obviously did not affect the international character of the transportation in its flight from New York to Mexico, with the intermediate domestic stops of Washington and Dallas. Nor did it have any causal connection to the issue of notice to the passenger of limited liability under Warsaw as here.

The *Preston* case cited by Alitalia at page 14 of its Petition was concerned only with omission of certain intermediate "agreed stopping places" en route from London to Kenya and suffers from the same inappositeness as *Grey* which it follows. The *Montague* case cited at page 14 was concerned with goods. The issue of notice or readability was not present in the lower court *Eck* decision and the *Manufacturers Trust* case was sent back for trial on the issue of notice.

The law review article by Lowenfeld and Mendelsohn (Petition p. 13) deals mainly with the events leading to the denunciation by the United States and its later withdrawal. The off-hand and mistaken guesswork as to Judge Macmahon's reasons for certifying an appeal is demonstrably groundless particularly in light of the subsequent Court of Appeals affirmance.

CONCLUSION

Petitioner's application is an artful attempt to create large issues which are in fact non-existent. There are no issues requiring the Court's attention.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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